

Alternative Dispute Resolution in Court: The Japanese Experience

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I. INTRODUCTION

The main topic of this paper is the types of alternative dispute resolution (ADR) which take place within the framework of civil court proceedings and are consequently subject to judicial involvement. American judges have recently become more active participants in this process; Japanese judges have been involved in settlement proceedings for a long time. According to recent research, American trial judges' style of participation in civil settlement discussions varies widely according to the views of each individual, and, in some cases, according to the type of litigation involved.¹ The research classifies their attitudes into three categories: aggressive, subtle, and no intervention, and shows that the majority (67.9 percent) of American judges intervene subtly through the use of suggestions.² Only a small proportion (10.3 percent) venture to intervene aggressively through direct pressure.³ The study also reveals that a large number (21.8 percent) of judges do not intervene at all, but leave opposing counsel to reach settlement on their own.⁴ Faced, however, with long delays and large backlogs in litigation, American judges have apparently increased their participation in the settlement process. Increased judicial involvement is justified by the occasional need to redress inequality in the bargaining power of the parties, and by the lack of built-in incentives to settle.

In Japan, there is also congestion in the court docket. In addition, however, the courts operate in the context of a very strong, popular and traditional preference for resolution by compromise. For these and other reasons, Japanese judges intervene extensively during in-court settlement. Indeed, although the amount of involvement naturally varies, every Japanese judge is expected, indeed almost required -- both by the law and by the litigants -- to move the lawsuit towards settlement. There is, of

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1. See J. RYAN, A. ASHMAN, B. SALES & S. SHANE-DUBOW, AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE 173-95 (1980) [hereinafter AMERICAN TRIAL JUDGES].

2. *Id.* at 177.

3. *Id.*

4. *Id.*

course, a good deal of informal or group-directed dispute resolution in Japan, as in the West. Furthermore, there are a number of structured, but non-judicial, forms of ADR. However, the main contrast between Japanese and Western dispute resolution lies in the widespread adoption of methods of ADR whose source is not the will of the disputants but the law, and whose personnel are part of the court system.

This Article describes the two principal types of Japanese in-court ADR. Both have their source in statute, not agreement, and both involve the judiciary. In the first, it is the judge who decides to switch the litigation to a settlement mode, takes off his robe, and acts as mediator. This process is referred to as *wakai*, which is translated as settlement-in-court, and is explained and evaluated in Part II of this Article.

The second type of in-court ADR involves both the judge and laypersons, and is called *chôtei*, translated here as conciliation-in-court. It bears some resemblance to mediation or arbitration, which is in use in an increasing number of American courts. Although the early North Dakota experiment using this form of ADR ended in 1921, several states have more recently attempted to counter delays in formal litigation by the use of in-court facilitators. By 1975, some system of court-sponsored ADR had been adopted in sixteen states, and was under consideration in others.⁵ For example, in Michigan Mediation, the parties are brought together before an impartial lawyer employed by the court as mediator or conciliator who tries to lead them to a settlement and, when it seems necessary, offers an impartial view of the probable outcome of trial.⁶

In Japan, a similar scheme was first passed piecemeal in various statutes and then was established as a uniform system for civil matters in 1951. The conciliation committee is chaired by a judge and consists of two laypersons. The *chôtei* form of ADR is discussed in Part III of this Article. To complete the discussion, Part IV summarizes the other types of institutionalized ADR found in Japan.

5. See MINJI SOSHŌ NO PURAKUTISU NI KANSURU KENKYŪ 196 (Shihō Kenshūsho ed. 1989) [hereinafter Shihō Kenshūsho].

6. The English Bar recently proposed a similar program. LONDON COMMON LAW AND COMMERCIAL BAR ASSOCIATION, ALTERNATIVE DISPUTE RESOLUTION: PROPOSAL FOR A PILOT SCHEME SUBMITTED TO THE GENERAL COUNCIL OF THE BAR ON BEHALF OF THE LONDON COMMON LAW AND COMMERCIAL BAR ASSOCIATION 3 (1990) (Secretary, Andrew Smith, QC; Fountain Court; Temple EC4Y 9DH).

II. SETTLEMENT-IN-COURT (*WAKAI*)

A. *The System*

1. *The Statutory Basis.*

On a very narrow statutory foundation, the Japanese judges have, over recent years, erected a subtle structure of court-directed initiatives and procedures whose aim is to enable the judge (in even the highest court) to suspend the formal and public litigation process and to switch to a less formal and private procedure. The goal of this process is to encourage the parties to settle their own dispute.

The legislative provisions of the Code of Civil Procedure are only two in number:

Article 136(1): At any stage of the court procedure in the case, the court may admonish the parties to join the process of arrangement for settlement-in-court presided over by the judges.⁷

Article 203: If entered in the court record in the presence of the judge, the registrar, and both parties or their agents, the concluded settlement-in-court and conciliation-in-court finally reached by both parties may be recognized as having the same binding effect as that of a final court decision.⁸

The verb translated as admonish is weaker than command but stronger than advise. The statute does not address the content of the process of settlement-in-court, and so it has been left entirely to the judges to determine the methods by which settlement is to be attained. The development of the practice has depended on the personal skills of the judiciary and very little has been published on the subject. Recently, because of the increased importance of the process of settlement-in-court, experienced judges have written a number of treatises and academic works on the methods of, and skills required for, the process of court-directed settlement.⁹

7. MINSHO (CODE OF CIVIL PROCEDURE) art. 136(1) (transl. by Bernard Rudden and Nobuaki Iwai).

8. *Id.* art. 203.

9. Shihō Keshūsho, *supra* note 5, at 141-94; SOSHŌJŌ NO WAKAI NO RIRON TO JITSUMU, (I. Gotō & K. Fujita eds. 1987) [hereinafter Gotō & Fujita]; Itō, *Wakai Kanshi no Gihō to Jissai*, 73 SHIHŌ KENSHŪSHO RONSHŪ 22 (1984); Kusano, *Wakai Gijutsu Ron*, 589 HANTA 8 (1986) [hereinafter Kusano, *Wakai Gijutsu Ron*]; Kusano, *Soshōjō no Wakai ni Tsuite no Saibankan no Wakaikan no Hensen to Arubeki Wakai Unei no Mosaku*, 704 HANTA 28, 28-36 (1989); Mutō, *Minji Soshō ni Okeru Soshō Shiki ni Tsuite 1975-II SHIHŌ KENSHŪSHO RONSHŪ* 90 (1976); Nishi, *Minji Saiban ni Okeru Soshō Unei no Riron to Jissai (Chū)*, 1104 HANJ 3, 9-12 (1984); Ryūzaki, *Shimin no tameno Minji Soshō*, 452 HANTA 16 (1982); Tanaka, *Minji Daiishin ni Okeru Wakai ni Tsuite: Saibankan no Yakuwari o*

Because the provisions quoted apply to both trial level (first instance) and appellate proceedings, the admonition and arrangement for settlement are also often made in the courts of appeal (referred to as high courts in Japan) and even, if rarely, in the Supreme Court. As a matter of fact, the high court's process of settlement-in-court is available for almost all civil appeals. The rate of settlement is much higher than at first instance because the high court judges can more effectively persuade the parties by reference to the fact-finding or reasoning in the court below, whose judgment has already been delivered to them. The Japanese civil judgment is always in writing and contains a statement of facts (including opinions on the weight of the evidence), an account of the arguments adduced, and of the court's reasoning. Thus, at the appellate stage, many issues of fact or law will have been made clear for both parties. In addition, the high court is the last instance at which matters of fact can be examined or argued; and its presiding judges are extremely highly regarded as the most senior and experienced members of the judiciary. Participation in settlement by high court judges has an extremely persuasive effect on the parties, causing them to settle with greater frequency than at the district court level.

Wakai is available even at the Supreme Court stage, although admittedly this is rare; according to the statistics published by the Supreme Court of Japan during the last three years, about twenty cases each year, on average, have been disposed of by settlement-in-court at the Supreme Court level.¹⁰ An example of a case suitable for settlement-in-court by the Supreme Court would be an extremely complicated multi-party dispute that had already spent years before the lower courts and might have to be remanded only for technical matters such as a slight change in the estimate of damages. In such a situation, an early resolution through court-directed settlement might be preferable for all, and especially for plaintiffs facing hardship from the delay in compensation. Considering the significance of a high court decision, it goes without saying that a settlement conference with the Supreme Court would have an extremely persuasive effect on the parties.

2. Procedure.

In the final analysis, the parties theoretically cannot refuse the admonition for settlement-in-court and insist that their dispute be resolved

Chūshin ni, 32 MINJI SOSHŌ ZASSHI 133.

10. [1 MINJI. GYŌSEI HEN] SAIKŌ SAIBANSHO JIMUSŌKYOKU, 1988 SHIHŌ TŌKEI NENPŌ 196 (1989) [hereinafter 1988 SHIHŌ TŌKEI NENPŌ]; [1 MINJI. GYŌSEI] SAIKŌ SAIBANSHO JIMUSŌKYOKU, 1987 SHIHŌ TŌKEI NENPŌ 196 (1988); [1 MINJI. GYŌSEI] SAIKŌ SAIBANSHO JIMUSŌKYOKU, 1986 SHIHŌ TŌKEI NENPŌ 196 (1987).

by litigation (although in practice the judges usually do not force them when one or both of them are opposed to the transfer to settlement-in-court).¹¹ However, the parties are not legally bound to reach agreement with each other during settlement-in-court. On the other hand, the parties can ask the court to issue the admonition for settlement at any time.

The actual practice is as follows. When judges intend to issue an admonition for settlement, they usually first ask the parties or their lawyers, in the courtroom, about their intentions as to settlement, *i.e.*, whether they wish the dispute to be submitted to settlement-in-court. In many cases the parties are amenable, and the court then issues the admonition and transfers the dispute to the settlement mode. Counsel frequently indicates that he is only following the court's admonition, to avoid showing any weakness that might be deduced from a preference for settlement. This occurs although counsel privately welcomes the admonition and may even have requested it informally through the court clerk. If the dispute appears to the judge to be appropriate for settlement at that stage, he advises both sides to participate in the process, confirms their agreement, issues an admonition, and transfers the case to be scheduled for settlement-in-court.

In the exceptional cases in which one of the parties refuses to participate in settlement-in-court, the judge does not usually force them, but will continue the formal litigation, while looking for the best moment to again propose the settlement mode. In general, the process of switching from one mode to the other is left to the skill and discretion of the trial judge. The judge always tries to find the best timing for starting the arrangement for settlement and has the opportunity to continually reassess the case during litigation. Judges steer the formal litigation procedure by examining allegations of pleading, documentary and other evidence, requesting further explanation on unclear points in the parties' pleadings, and considering circumstances of the case that may go beyond the purely legal issues.¹²

Once both parties agree to sit at the settlement table, the process is left to the initiative of the court, *i.e.*, the same person that, in the formal mode, was the trial judge. In many cases, because the main obstacle to settlement is the strong feelings of hostility between the parties, it is very important to allow them to talk as much as possible about their feelings, grievances, and positions, to listen to them patiently without interruption, and to show understanding. Sometimes it proves effective to give the parties an opportunity to talk about their case in the witness box in court by switching the procedure back to the trial, and then resuming the

11. See T. KAJIMURA & R. FUKAZAWA, WAKAI. CHÔTEI NO JITSUMU 52 (1988).

12. See Itô, *supra* note 9, at 27-29.

settlement negotiations. Once the parties feel satisfied that they have been given the opportunity to express their feelings and to explain their position in sufficient detail, their attitudes often become surprisingly co-operative and flexible, and disposed towards settlement by the court. The most important requirement for successful judicial management of settlement negotiations is that the judges acquire the trust of the parties. The parties must believe that the judge understands the whole situation even better than the parties themselves, and is genuinely trying to benefit both parties from a fair and objective point of view.

In practice, these negotiations may be opened at various stages in the formal litigation procedure, but the procedure is very similar throughout those stages. The typical process of settlement-in-court is as follows.

If both parties accede to the court's admonition, the court sets the date for a settlement hearing, and summons the parties to a meeting room specially prepared for the conference, which is inside the court building but is not itself a courtroom. The judge chairs the meeting and his avowed purpose is to persuade the parties to reach some sort of compromise. Such meetings are normally held every two to three weeks on average, with the total number of meetings depending on the complexity of the case. Simple cases may require only two or three meetings to reach a settlement; complex cases may require ten or more.

A range of techniques is available to the judge. He may meet with both parties together or may invite each side (with their attorney) to come separately to the meeting room to explain their complaints in the absence of their opponent. Separate meetings are the typical procedure because this allows the judge to encourage the parties to express their views and feelings candidly without provoking their opponent's antagonism.¹³ In some cases, the judge invites both parties and their attorneys (or only the lawyers) to come at the same time and conducts a process that is a flexible combination of mediation and negotiation. Generally speaking, the use of the latter method has been limited to complex, commercial cases, in which it appears absolutely necessary to add the process of direct negotiation between the parties to that of mediation by the judge in order to correlate a wide range of related issues and interests.¹⁴

At the beginning of the first hearing, the judge usually holds an opening session with both parties and gives a general introduction to the process, perhaps mentioning the merits of this mode of dispute resolution. At this stage, the parties do not again present their case, because the judge will be familiar with the case from the earlier proceedings. Some

13. See Kusano, *Wakai Gijutsu Ron*, *supra* note 9, at 11.

14. See Tanaka, *supra* note 9, at 149-50.

judges prudently ask the parties whether they would prefer separate meetings.¹⁵ They usually do, of course, because they want to be able to present their side of the case and their candid views without worrying about a negative reaction or serious counter-attack by the other side. Because both parties and their attorneys often assume that they will be able to meet separately with the judge, these meetings are often scheduled automatically. On the other hand, if the judge intends to proceed with a joint conference, he always obtains the parties' consent, because this method is unusual and will often be opposed by one or both of the parties.

When the meeting begins, the pattern of the process is as follows, whether the judge sees the parties separately or together.¹⁶ At the initial stage, the judge lets each party explain its complaints, the circumstances of the dispute, the steps already taken in negotiation, and so on. They are allowed to make assertions as to the background and general circumstances of the case and are not limited to the issues relating to their legal claims. At this stage, as mentioned above, it is very important for the judge to allow the parties to ventilate their feelings as much as possible and to listen patiently to their complaints. The parties must feel fully satisfied that they have been sincerely heard and handled with wisdom and kindness by a sympathetic and merciful third party of authority.

After expending sufficient time and effort on this first stage, the court makes a suggestion on positive methods of compromise, and normally attempts to offer a wide range of choices for the parties to consider. At the end of each meeting, the court admonishes both parties to think over the possibility of further concessions by the following meeting.

When the conditions proposed by both parties become so close that a final agreement seems to be realistically possible, the court often submits a concrete final proposal for agreement and admonishes both parties to consider whether they will accept it. In presenting this proposal, the judge will demonstrate a grasp of the total circumstances of the case, and, in a carefully controlled manner, will suggest his opinion on the legal issues or the weight of the evidence, and on the appropriateness of the proposed solution for the future mutual relationship of the parties. Of course, in cases in which the court succeeds in persuading one party to accept the other's final offer, the court does not submit its own proposal. If the parties accept the court's proposal (or one party accepts the other's), a settlement is concluded, which when

15. *Id.* at 150.

16. See Itō, *supra* note 9, at 32-36. See also Kusano, *Wakai Gijutsu Ron*, *supra* note 9, at 11-17.

registered under the Code of Civil Procedure, has the effect of a final court judgment.¹⁷

If the terms acceptable to each party are so far apart that further compromise appears to be impossible, or if one party will accept neither the other's final offer nor the judge's final proposal, then the court makes an order to send the procedure back to the formal adjudicatory process and sets the date for the next formal hearing. Similarly, if the judge concludes that agreement will not be possible or advisable at any stage, he is expected to re-commence the formal litigation in order to prevent further delay.

Usually judges make the admonishment for settlement at one of the following stages of litigation:

- (1) At a very early stage (after the first hearing date of the litigation or after the exchange of the basic pleadings);
- (2) After the exchange of major pleadings and submission of main documentary evidence (before the hearing of the testimony of witnesses or parties); or
- (3) After the court has examined all the major witnesses or parties.¹⁸

When the settlement hearing is held during the early stages, the court has not yet obtained sufficient information about the true nature of the dispute. Therefore, at that stage, the judge cannot persuade parties very strongly and is usually restricted to the function of a genuine facilitator. The judge tries to clear up the real issue of the dispute, to remove mutual misunderstandings, and to improve the likelihood of mutual concessions by supplementing the negotiating ability of parties. Discussions at this stage help both the court and the parties to understand the dispute and to look for points that both parties will concede.

During the middle stages of litigation, the basic structure of the process is almost the same, but usually the court understands the real issue and the circumstances surrounding the dispute, and has obtained enough information to form its own opinion on the weight of the arguments or evidence submitted by the parties. At this stage, therefore, the judge plays a more active role in the mediating process. After making it clear that his view is based only on the impressions gained through the

17. MINSOHŌ (Code of Civil Procedure) art. 203 (transl. by Bernard Rudden and Nobuaki Iwai).

18. See Mutō, *Minji Soshō ni Okeru Soshō Shiki ni Tsuite*, 1975-II SHIHŌ KENSHŪSHO RONSHŪ 90, 95-96 (1976); Tanaka, *supra* note 9, at 140. It should be noted that Japanese Civil Procedure Code lacks an analog to pre-trial disclosure; the exception is the "preliminary procedure" process, which is rarely used in practice because of its rigid effect of limiting any further submission of pleadings and documentary evidence. Pleadings and submission of documentary evidence are usually held during the course of the formal trial unless the process of "pleading-and-settlement," explained below, is adopted.

course of the litigation, the judge may often persuade parties to make reasonable concessions by prudently explaining the risk that each party would take by pursuing the formal adjudicatory process and by inviting them to reflect on the merits of settlement.

By the final stages of litigation, the judge has usually formed a final conclusion on the case by examining the allegations and evidence submitted by parties, hearing the witnesses, and considering the legal arguments. The court now plays its most active role in the process. Of course, judges must be very careful not to compel the parties to compromise. The judge is, however, expected to carefully disclose or hint at his opinion or impression of the case, the legal issues, and the facts to allow the parties to make the most prudent and well-informed decision for settlement.¹⁹

In summary, judges persuade parties by explaining the merits of a settlement compared to a formal court decision, by removing fundamental misunderstandings or obstacles to communication, and by making parties reflect on the positive future course of their relationship instead of the negative conflicts of the past. They must, of course, be very careful in persuading parties or forwarding proposals, not to give the impression that the penalty for non-acceptance might be the loss of the case; this practice would provoke questions about the fairness and impartiality of the court. If the process, the judge must also be extremely careful not to deliver a final decision, the content of which is inconsistent with the opinions disclosed in the course of persuading the parties to settle. This would likewise lead to serious mistrust and an impression that the court in the ADR mode, had been irresponsibly trying to impose an unfavorable and ill-grounded solution. In order to avoid any mistrust by the parties, therefore, the judges must examine all the arguments and evidence with as much care as if they were preparing to draft a final judgment,²⁰ and must respect the feelings and the free will of the parties before them. In doing so, they must consider the extent and manner of disclosing opinions prudently and flexibly in accordance with the characters or attitudes of the parties and attorneys at each stage of the proceedings.

3. *Standards.*

In the settlement-in-court process, the judges are not bound by the strict letter of the law applicable to the dispute in question, as they would be were they to deliver judgment at the conclusion of adversary litigation.

19. See Shihō Kenshūsho, *supra* note 5, at 90-92.

20. See Gotō, *Minji Soshō ni Okeru Wakai no Kinō*, in Gotō & Fujita, *supra* note 9, at 1, 20.

The Code of Civil Procedure does not explicitly grant this discretion, but the judges have traditionally exercised it. There are limits to the flexibility of the process: a settlement in which the result of the directed agreement is illegal, or against public policy, is invalid. Furthermore, because the judge actively supervises the process, the outcome should naturally reflect his view on the merits of the case, although the outcome may be influenced by the moral case of the weaker party or the circumstances surrounding the dispute. Therefore, the content of the settlement agreement should not be totally at variance with the objective merits of the arguments or strength of the evidence. Within these limits, however, the judges are not strictly bound by the law, but are allowed to create a new favorable relationship between the parties by considering all circumstances, including factors that are, in the strictest sense, irrelevant to legal issues. In practical terms, this is because the process is a mixture of mediation and litigation. In terms of the formal legal order, the result is justified on the grounds that the final settlement is based on the mutual agreement of both parties about a range of matters whose relevance and importance are ultimately determined by the autonomous disposition of the parties. Thus, as long as the final outcome is legal and appropriate for the case, almost any agreement is an acceptable result.

4. *Examples.*

The following examples are drawn from various fields of civil law.

a. *Debt Collection.*

In simple debt cases in which the court determines that there is an outstanding debt, the settlement agreement usually requires payment by installments and contains a penalty clause covering any future delay in payment. The penalty clause typically provides that if the debtor fails to make punctual payment of a number of installments, he will have to pay the entire balance due and a fixed-rate penalty. This system strives to combine a benefit to the debtor -- time to pay -- with an incentive for him to make the best use of this period of grace.

b. *Landlord/Tenant Cases.*²¹

Generally, tenants have certain statutorily protected rights under Japanese law. The Leased Land Act of 1921 and the Rented Houses Act of 1921 give tenants a right to renew their leases and precludes landlords from rejecting their offers of renewal. However, the landlord may justifiably refuse renewal for cause. These statutory exceptions apply when landlords sue for possession because the term of the lease has expired. Even when the landlord has the statutory right to refuse renewal, the courts still arrange compromises between the parties. Although the legislation appears to mandate a comprehensive scheme for balancing the interests of landlords and tenants within the context of formal litigation, this scheme operates only in the abstract. In any specific case, the Japanese judges may still use the admonition and switch the course of the proceedings to settlement-in-court.

Even when a tenant has violated the lease (*e.g.*, non-payment of rent, sublease without consent, breach of agreed user limits, or some other cause which ought to justify the landlord's claim), Japanese judges protect tenants and reject landlord's claims if the breach is regarded as not serious enough to destroy the trustful relationship between landlord and tenant. In this area, the Civil Code has been modified by precedents in favor of tenants, and the standard by which destruction of the relationship is to be measured has been set forth by case law.

Let us examine two examples of adjustments of statutory rights arranged by the judges in settlement-in-court. If the tenant is not in breach of contract and, thus, is fully entitled to statutory protection, she may be able to obtain an alternative residence or compensation, in return for her agreement to vacate. Even if the tenant is in breach, she may be allowed a period of time in which to vacate the property; or the landlord may be persuaded to make a fresh contract with the tenant and let her use the property for a certain time, but at a higher rent, an additional supplement, or with the obligation to vacate without delay if any breach of contract is committed. The choice of a particular method of resolution depends not only on the weight of the evidence, but also on the present circumstances and the future possibilities for the parties in a particular situation.

21. See Fukunaga, *Fudōsan Chintai-shaku Jiken to Wakai*, in Gotō & Fujita, *supra* note 9, at 237.

*c. Construction Contracts.*²²

In actions on construction contracts alleging defects in the premises, the evaluation of defects and the estimation of precise damage, in terms of loss of value or cost of repair, is a process that is both time-consuming and expensive, because of technical complexities and the rapidly changing cost of land and materials. In addition, the clauses agreed upon by the parties in the original contract are often too simple for meticulous application by judicial decision. For these reasons, the courts often persuade the customers to pay the contractors with a reasonable deduction for the amount of damage caused by defects in the premises. In some cases, the courts try to persuade the contractors to repair defects up to a specific standard, instead of accepting a lower sum.

d. Property Cases on Inheritance.

There are certain features specific to property cases whose main issues concern matters of inheritance.²³ These cases clearly involve family relationships. Because the normal pattern of relationships has been disrupted by a traumatic event (*i.e.*, the death of an ancestor), the family members may unknowingly attempt to come to terms with bereavement by focusing their emotional energy on some external topic, which may rapidly become an object of legal dispute between them. Psychologists are familiar with this "displacement effect" and one of the tasks of the Japanese judge is to sense when this is happening. Finally, substantial grievances may be involved, for example, if some survivors have contributed to the support of the ancestor during his lifetime, out of family feeling and not as a matter of legal duty. This situation involves certain elements of a commercial character, but in other aspects it is a problem of family relationships; mutual compromise is often extremely difficult, although the process of settlement-in-court may provide some form of therapy and remedy.

The process of settlement-in-court enables inheritances -- of real estate especially -- to be distributed or redistributed to successors and other appropriate persons according to their legitimate needs, both economic and emotional, and according to the appropriate use of the property. The process avoids resort to the rigidities of the mathematical

22. See Itô, *Kenchiku Ukeoi Jiken to Wakai*, in Gotô & Fujita, *supra* note 9, at 226.

23. Under the Japanese legal system, claims directly involving the administration or division of estates on the basis of the civil code are disposed of by the Family Court through the informal process of Family Matters Conciliation-in-court or Family Matters Adjustment. See Kaji Shinpan Hô (Family Matters Adjustment Act), Law No. 152 of 1947, §§ 9, 17, 18. As a result, only those claims which do not fall under these separate processes are submitted as civil suits in the District Court or Summary Court.

divisions set forth by legislators, which may injure not only the family, but also the property. Resolution by court-directed settlement means that the bereaved can use the judge as a sounding board, and the process is very beneficial for rebuilding mutual relationships among relatives and for preventing future disputes.

e. *Defamation.*

In libel cases, publishers are often persuaded to pay compensation, publish apologies and corrections in their own publications, withdraw the offending publication, or express an apology that is incorporated in the court record of settlement. Plaintiffs are also persuaded to accept reasonable offers by publishers to compensate for the damage to their honor as soon as possible and prevent future damage.

f. *Nuisance.*

When the noise of equipment and installations on the defendant's site is the problem, the court usually tries to effect a compromise involving limits on the time and methods of use of the equipment, methods and burden of costs of soundproofing, and alternative compensation. For this type of case, disposition by settlement-in-court is usually preferable to a final judgment or ruling, for two reasons. First, these types of final orders (*e.g.*, an injunction ordering the defendants to restrict the noise to a certain volume during certain periods) are difficult and expensive to supervise in order to ensure compliance. Secondly, because a final order may be merely the starting point of additional private negotiations by the parties leading to some variation on the order by a post-suit settlement, the court may prefer to supervise the entire process through settlement-in-court.

g. *Disputes on Loss of Sunlight.*²⁴

Cases in which inhabitants of areas near buildings under construction file suit for an injunction are usually disposed of by settlement-in-court. An injunction would order the suspension of construction on the basis of the necessity of protecting the inhabitants' legal interests of enjoying the sunlight. In 1972, the Supreme Court, in a case involving money damages, held that enjoyment of sunlight is an

24. See Sakamoto, *Nisshō Jiken to Wakai*, in Gotō & Fujita, *supra* note 9, at 284.

interest subject to legal protection.²⁵ Since then, the lower courts have issued injunctions ordering the suspension of construction in a large number of cases, on the basis of the claimant's legal position as an owner of property or even as a human being whose personal rights must be protected from all types of infringement.²⁶

In some of the settlements-in-court, the plans and designs of the projected construction are amended in order to lessen the loss of light to the neighbors' homes, and the contractor may pay compensation for consent to continue construction. In others, the residents are persuaded to accept the plans as is in return for monetary compensation. Settlement-in-court avoids an "all-or-nothing" outcome, which might be the result of a strict application of the relevant legal rules. Because the order may be the starting-point for further negotiation, the judge anticipates this outcome and drafts an order that will determine the direction of future negotiations.

h. *Medical Malpractice.*²⁷

In medical malpractice cases, the court usually admonishes the parties to settle after it has examined most of the major documentary evidence, witnesses, and the reports of the court-appointed medical experts. The expert's reports are often the most important evidence. At this stage, the court often has already formed a final opinion on the case, and the parties can anticipate the court's final decision with a high degree of precision. If the doctors are liable, the court will persuade them to offer a reasonable amount of damages and express an apology, which the victim will be urged to accept and which will be entered on the court record. Doctors frequently accept the admonition to avoid further damage to their reputation. If the court finds it difficult to establish the legal liability of the doctor, it may nonetheless perceive certain shortcomings in the profession's treatment or attitude. Additionally, the hardship suffered by the patient or his family may be extreme. In these cases, the court may admonish the defendants to offer a certain amount of money, not as legal compensation, but as a token of sympathy and to indicate their desire for harmonious resolution. At the same time, the court may point out to the patients that establishing legal negligence is difficult because of

25. Judgment of June 27, 1972, Saikō Saibansho (Supreme Court), Japan, 26-5 Minshū 1067.

26. See Sakamoto, *Nisshō Bōgai o Riyū to Suru Kenchiku Sashitome no Saibanrei* (*Kenchiku Bōgai Kinshi no Saibanrei*) no Dōkō to Kentō, in NISSHŌKEN SOSHŌ NO JITSUMU 65 (Kazuo Yamaguchi ed. 1980).

27. See Matsuno, *Iryō Kago Jiken to Wakai*, in Gotō & Fujita, *supra* note 9, at 270.

the reliable scientific evidence that works in favor of the doctor and urges them to accept a reasonable offer.

i. *Traffic Accidents*.²⁸

In Tokyo District Court and Osaka District Court, traffic and work accident cases are dealt with by special divisions (the 27th division in Tokyo and the 15th division in Osaka). These divisions have been publishing detailed standards for estimating damages, which have proved very helpful in establishing fair and uniform methods to calculate compensation. These standards have already been adopted by other local courts all over the country for many decades.

In traffic and work accident cases, arrangements for settlement are steered by the active initiative of the judges according to these published standards. Usually, after examining the important evidence and testimony, the courts admonish the parties to begin settlement-in-court and, because both counsel are familiar with the published standards, the judge's objective proposals are very persuasive. Consequently, the percentage of disputes concluded by settlement-in-court is much higher for accident cases than for disputes as a whole.

j. *Mass Tort Litigation*.²⁹

Mass tort litigation requires a great deal of time and expense to reach a final decision by the court. Additionally, appeals are common and may take several years in superior courts. Consequently, even if plaintiffs are finally successful, the compensation obtained by a final court decision may be too late and the net gain too small to be a sufficient remedy for their injury.

For these reasons, the court always tries to persuade both parties to reach a settlement, in order to avoid loss of time and additional cost, and to compensate victims as soon as possible. These large-scale cases furnish important precedents; principles established by them may provide guidelines for later lawsuits. In the past, defendants, which are usually major companies, were reluctant to offer compensation before final judgment. Recently, however, the accumulation of precedents has enabled defendants to anticipate the final judgment in their case, and they have begun to accept the court's proposals for settlement, to avoid further serious damage to their reputation. Management understands that early

28. See Katō, *Kōtsū Jiken, Rōsai Jiken to Wakai*, in Gotō & Fujita, *supra* note 9, at 299.

29. See N. Onodera, *Shūdan Soshō Jiken to Wakai*, in Gotō & Fujita, *supra* note 9, at 312.

resolution by settlement may be economically beneficial to the company as a matter of management strategy, even when large awards are involved.

When settling multi-plaintiff cases, the court must consider carefully the relationship of the interests among the plaintiffs and propose settlements that fairly compensate plaintiffs with varying types and degrees of injuries. Although the more informal types of ADR are not appropriate for resolving multi-party disputes, an in-court settlement process, which combines the functions of trial and ADR, provides the judge with the means to control all the parties and handle the disputes effectively.

k. *Inter-Company Disputes.*

In cases involving disputes between companies that cannot avoid continuing transactions with each other, the court makes a special effort to establish a constructive relationship that will benefit both in the future and that will also respect the pride of the management on both sides.

5. *An Assessment.*

The following points represent a comparison of the merits of adjudication and settlement-in-court.³⁰

- (a) Resolution by settlement-in-court is a final resolution, which cannot be appealed by either party and has the same binding effect as a court decision. (Settlement agreements are vacated rarely and only if a court finds serious defects in the substance of the agreement, or the procedure used to reach agreement).³¹
- (b) Settlement-in-court can provide parties with a flexible and total resolution that is adapted to the actual dispute and based on common sense. On the other hand, a court decision may be too rigid for the actual circumstances in many cases. There are at least two reasons for this: (1) the formality of the procedure and the application of the rules of evidence may obscure the real issue in the case, and (2) trial often results in an all or nothing decision.

30. See Shihō Kenshūsho, *supra* note 5, at 148; Gotō, *supra* note 20, at 17-19; Itō, *supra* note 9 at 26-27; Kusano, *Wakai Gijutsu Ron*, *supra* note 9, at 10; Ōishi & Katō, *Soshōjō no Wakai no Ichizuke*, in Gōto & Fujita, *supra* note 9, at 22-40; Ōta & Hozumi, *Funsō Kaiketsu Hōhō toshite no Soshōjō no Wakai*, in HOSHAKAIGAKU NO GENDAITEKI KADAI (Shiomi & Watanabe eds. 1971); Tanaka, *supra* note 9, at 134-36.

31. See MINJI SOSHŌ HŌ KŌGI 381-95 (T. Nakano, K. Matsuura & M. Suzuki eds., rev. 1980).

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- (c) Settlement-in-court can provide parties with a solution that takes account of the future relationship between them or with a third party who has a close relationship to the dispute. Thus, it permits them to avoid serious damage to their relationship, which is almost the inevitable result of a court decision, and may enable them to restore a harmonious relationship.
- (d) Unsuccessful parties are often reluctant to comply, or at least to comply speedily, with a court judgment. The litigant may be unwilling to make voluntary performance or payment, and may try to evade enforcement, if the judgment is the result of a process which he or she found remote, cold, and incomprehensible.

On the other hand, settlement agreements usually contain a penalty for late performance, so parties try to perform their obligations before the fixed date. Incentives to perform are also stronger because the result was reached by consensus and will benefit both parties. Therefore, a procedure which is less formal may enjoy a higher rate of compliance than formal court decisions.

- (e) Settlement-in-court can provide parties with faster resolution, because it avoids court congestion and time-consuming appeals.

The following points represent a comparison of settlement-in-court and other methods of ADR.

- (a) Because the court supervises the whole process, the fairness and appropriateness of the settlement's legal content is guaranteed. The court can protect the legal rights of the party with less bargaining power than the other parties.
- (b) Because the court is involved, the persuasive effect of the agreement is relatively high, as is the finality of the agreement, compared to private negotiation or mediation.
- (c) In many cases attorneys prefer settlement to final court decisions because they can avoid the risk of losing and because it is easier for them to persuade both their clients and the other parties after they hear the legal views of a neutral, but informed judge. In this sense, it can be said that attorneys often utilize the authority of the court in order to persuade their clients and the other parties to settle.

6. *The Extent of Settlement-in-Court.*

In the history of Japanese civil procedure, the prevalence of on-going judicial management of settlement-in-court is a phenomenon of recent decades. Originally, the resolution of disputes by settlement was regarded by the judges with less favor than formal litigation. The traditional argument goes as follows: parties come to the court to obtain an adjudicatory judgment, and it is the responsibility of the court to respond to the request of parties; therefore, judges should use the formal method of decision-making and not attempt to avoid their essential task.

However, settlement-in-court is now viewed as a very important process that has the same significance as an adjudicatory decision.³² This change occurred amidst an increase in the number of complex disputes, an increase in the total number of lawsuits, and the recent development of academic research on the positive functions and merits of settlement-in-court.³³

According to statistics published by the Supreme Court of Japan in 1988, about 33 percent of all civil cases in the district courts are disposed of by settlement-in-court, 18 percent by voluntary dismissal, and about 45 percent by court decision.³⁴ However, because many dismissals are also the result of settlement-in-court, the process may resolve more than 40 percent of disputes. In addition, more than 40 percent of formal court decisions are default judgments so the percentage of cases tried to a conclusion is only about 25 percent of the total number of civil cases. Examining the actual disposition of civil cases points out the important role settlement-in-court fulfills as the preferred method of dispute resolution in Japanese civil procedure.

B. *The Process for Pleading-and-Settlement (Benron-ken-Wakai)*

In recent years the growing popularity of settlement-in-court and increased experience with its use has led to the development of a less formal version, which is used immediately after the pleadings are filed. This process, developed by judges in Tokyo and Osaka District Courts, is

32. See Itō, *supra* note 9, at 23; Kusano, *Soshōjō no Wakai ni Tsuite no Saibankan no Wakaikan no Hensen to Arubeki Wakai Unei no Mosaku*, 704 HANTA 28 (1989); Mutō, *supra* note 9, at 94; T. Oishi's comment in Fujita, Oishi, Kawaguchi, Hata, Hatakeyama, Miyake & Yamaguchi, *Wakai to Soshō Unei (Zadankai)*, in Gotō & Fujita, *supra* note 9, at 126 [hereinafter *Wakai to Soshō Unei*] (Judge Tadao Oishi's comments).

33. See *supra* note 9.

34. 1988 SHIHŌ TŌKEI NENPŌ, *supra* note 10, at 144.

called "pleading-and-settlement" (*benron-ken-wakai*).³⁵ The practice has been widely adopted in lower courts because of the necessity of ensuring speedy and effective hearings. Because the General Secretariat of the Supreme Court of Japan has shown high appreciation of the methods involved and has made this innovation well known to all local District Courts by widely distributing reports on the process used in the Tokyo and Osaka District Courts,³⁶ the process is now practiced on a nationwide scale.³⁷

In formal adjudication, the initial stages are written, remote, and protracted. Pleadings involve the exchange of documents prepared by counsel on specified pleading dates, which are normally held about once a month in the courtroom. Counsel usually then asks the court to allow them to prepare further documents for counter-argument, and, consequently, exchanging the pleadings is a lengthy process. As its name suggests, pleading-and-settlement is an attempt to resolve the dispute at the outset. The method is as follows.³⁸

Shortly after the first formal step in an action, both the parties and their counsel are summoned together to a meeting room at the courthouse. The judge questions the factual and legal issues of the case and allows both parties to explain their claims and the circumstances of the dispute in a very informal and flexible manner. Thus, in contrast to litigation by correspondence, which constitutes the first stages of formal litigation, this process turns almost immediately to oral discussion. The judge can intervene at any time, not only as a judge, but also as a facilitator, and can ask parties to make immediate counter-arguments or assertions. In addition, the judge can talk directly with parties, and make a more accurate assessment of the facts and equities of the case at a very early stage of the procedure. This method helps the judge speedily determine the real issues in the case and determine the best moment to issue the admonishment for settlement at an early stage of the procedure. When the judge finds it appropriate to arrange a settlement conference, he can immediately make the admonishment and start settlement conferences in the same informal manner. If the judge finds it appropriate to make the admonishment after examining several important witnesses, he explains

35. Some writers reverse the order calling it "settlement-and-pleading" (*wakai-ken-benron*). This (at least in Japanese) somewhat alters the emphasis between the elements. There is, however, no approved statutory term.

36. SAIKŌ SAIBANSHO JIMUSŌKYOKU, MINJI SOSHŌ NO SHINRI O JŪJITSU SASERU TAME NO TOKYO, OSAKA RYŌ CHIHŌ SAIBONSHO NO HŌSAKUAN (1987).

37. See SAIKŌ SAIBANSHO JIMUSŌKYOKU, MINJI SOSHŌ NO SHINRI NO JŪJITSU O HAKARU TAME NO HŌSAKU NI KANSURU KYŌGI YŌROKU 54-62 (1987); Shihō Kenshūsho, *supra* note 9, at 96.

38. See SAIKŌ SAIBANSHO JIMUSŌKYOKŪ, *supra* note 36, at 12-13, 28-30; Shihō Kenshūsho, *supra* note 5, at 94-103; Iiō, *supra* note 9, at 29-31.

the plan to the parties beforehand and makes the admonishment after the testimony of the witnesses. Generally, this process enables the court to discover at an early stage in the proceedings whether, in any given case, settlement-in-court is a suitable method for resolving the dispute and if so, the appropriate timing for the admonishment. But if even at this early stage the parties are reluctant to sit at the settlement table, this process helps the court handle the pleadings, determine the issues, and obtain a good deal of useful information about the dispute.

Since strictly speaking, this process does not appear to satisfy the legal requirement of public notice, this problem needs to be overcome in practice. Usually, if this process does not end in a final settlement, the court reinstates the case and summarizes the previous proceedings on the court record in open court. The case then proceeds to further hearings in the usual course of litigation. Because the parties are present at the proceedings and thus, have notice, which is really indispensable in civil procedure, the lack of formal notice to the public does not seem to cause serious misgivings, even among legal scholars. The merits of this flexible and speedy process overcome the defects of the overly formal and even rigid former practice, and consequently the practice is increasingly favored³⁹ and is becoming prevalent in the Japanese courts.

C. Judicial Attitudes to Settlement-in-Court and Pleading-and-Settlement

Because the statute gives no legislative guidance on organizing and steering the process of judicial settlement or that of pleading-and-settlement, but leaves it to the discretion and personalized skill of the judiciary, the settlement methods can vary greatly between judges.⁴⁰ For example, judges that hold very positive views on settlement issue an admonition for settlement at an early stage in any case, unless one or both of the parties are clearly opposed to the practice. These judges also often use the process of pleading-and-settlement in order to introduce the process of settlement. If these early steps fail, these judges will usually try another settlement conference at a later stage, when all of the major evidence has been examined.

In contrast, judges that do not encourage settlement will issue an admonition for settlement at an early stage of the litigation only when it is requested by the parties or in special circumstances. These judges use pleading-and-settlement only on limited occasions. Nevertheless, most judges issue an admonition for settlement at least once during the entire

39. See SAIKŌ SAIBANSHO JIMUSŌKYOKŪ, *supra* note 36, at 54-62; Nakano, *Jitsumu no Keiju*, 3 KIKAN JITSUMU MINJI HŌ 6 (1983).

40. See Kusano, *Wakai Gijutsu Ron*, *supra* note 9, at 9; Tanaka, *supra* note 9, at 146-47.

course of the litigation, and use pleading-and-settlement for certain cases. Only a minority of judges prefer the formal processes of litigation.

Thus, Japanese judge's attitudes towards court-directed settlement vary widely as do attitudes in the United States' judiciary. As discussed in Part I, socio-legal research on the attitudes of American judges towards court-directed settlement attempts to classify them into three types: aggressive, subtle, and no intervention.⁴¹

Because Japanese judges always play some sort of role in the process, the no intervention judge does not exist in Japan, but judges may be categorized as very active, subtle, and flexible (very active or subtle, depending on the case). Some judges are very active in intervening and persuading the parties towards compromise with some vehemence and considerable patience. Generally, they have positive views about the disclosure of their own opinions on the matter, and do not hesitate to influence the parties by disclosing their views on the legal issues, the facts, or the evidence, and by warning the parties of the risk and disadvantages of formal litigation by the court. Even if one of the parties repeatedly refuses an offer made by the other, this judge does not readily return to the trial mode, but patiently continues the sessions and tries to reach compromise. However, the judges are very careful not to cause unnecessary delays by futilely continuing the process on intractable cases.

Other judges are more tentative. Reluctant to interfere with any parallel negotiations that may be conducted by the litigants, they tend to limit their role in a settlement to that of a genuine facilitator, whose task is merely to supplement any lack of negotiating ability between the parties and to help them reach autonomous consensus. These judges regard their role in the settlement process as essentially passive, fearing that too much intervention in the negotiation process between the parties causes them to mistrust the judge and to doubt the court's fairness and neutrality. Therefore, they are very reluctant to make any disclosure of their own opinions on the case, and restrain themselves from persuading parties by referring to their own opinions on the issues of law or facts. These judges also pay great attention to the relationship between the two modes of resolution (litigation and the settlement procedure) and are concerned about providing the due process inherent in the former mode. Because they are much less committed to resolution by settlement, they are more likely to halt it and return the dispute to the formal judicial procedure.

An unusual feature of the Japanese settlement-in-court process (though not of the conciliation-in-court process discussed in Part III) is that the same state officer plays three roles: the judge; the director of the settlement procedure; and the administrator that decides when to switch

41. AMERICAN TRIAL JUDGES, *supra* note 1, at 177.

processes. This practice contrasts with the common rule in American courts, which prohibits the same judge from presiding over the settlement conference and the trial of a case.⁴² This rule avoids any suspicion of prejudice and ensures procedural fairness, eliminating the problems created when judges fulfill two different functions. Because Japanese judges serve two conflicting purposes, they have to be especially careful not to confuse the trial procedure with the settlement process, and to maintain their neutrality by ignoring any inappropriate impressions acquired during the settlement process.

The judges continually need to consider the problems inherent in their dual roles, particularly from the parties' viewpoints. The parties see the same person acting at one stage as an impartial judicial authority and at another as mediator. A particularly delicate issue concerns the extent, to which, in the settlement process, the judge should indicate his legal opinions on the facts, the evidence, or the law. Today most Japanese judges accept that to a reasonable extent and in a carefully controlled manner, they should disclose their opinions in order to actively encourage settlement, and allow the parties to reasonably anticipate the result in a court decision and thus, reach a more informed settlement.⁴³ On the other hand, a party who is informed of her risk of losing her case may feel as if threatened by the judge and doubt the fairness and impartiality of the court. For this reason, in disclosing their opinions during settlement negotiations, the judges must respect the free will and the feelings of the parties as much as possible, so that they do not get the impression that the penalty for non-acceptance of a proposal might be the loss of their case. Moreover, if the settlement mode fails and the process is remitted to trial, judges must be careful not to deliver decisions whose conclusions or reasonings differ from their earlier opinions, and must avoid the appearance of bias gained from their negotiations with the parties. In order to avoid this danger, when disclosing their opinions during settlement, the judges must examine the allegations and evidence as carefully as if they were preparing to write a final decision and yet must clearly distinguish this informally acquired information from the evidence submitted in accordance with the rules of the formal procedure. Furthermore, in offering opinions as part of the settlement process, the judges must make it clear that this is merely a temporary impression formed only on the basis of the parties' preliminary arguments and the submitted evidence. The most common way that a judge discreetly discloses his opinion is to directly warn a party of the risk of losing the

42. See Tanaka, *supra* note 9, at 151-54.

43. See SAIKŌ SAIBANSHO JIMUSŌKYOKU, *supra* note 37, at 46-54; SAIKŌ SAIBANSHO JIMUSŌKYOKU, *supra* note 36, at 15, 34; Shihō Kenshūsho, *supra* note 5, at 172-80.

case by pointing out the weak points in the party's evidence or arguments. More subtle judges prefer to imply the risk of losing by confining their intervention to questioning the party's weak points, and referring to the general idea that every party to an action runs the risk of an unfavorable outcome.

The active involvement of the Japanese judiciary in the process of settlement of their cases contrasts sharply with the traditional attitude of common-law judges, who strictly constrain their function within the framework of formal litigation and maintain independence from ADR. This attitude is still prevalent in England, but has begun to change in the United States.

III. CONCILIATION-IN-COURT (*CHÔTEI*)

This Article now turns to the other combination of formal adjudication and ADR that occurs inside the Japanese court system, conciliation-in-court. This method satisfies certain needs of Japanese society and, since the pre-war period and even before the enactment of uniform legislation, it has been one of the main types of dispute resolution practiced by the system and the people.

Conciliation-in-court is a method of dispute resolution by a collaborative body called the conciliation committee, which is chaired by a judge and includes two or more commissioners selected by the court. The commissioners are selected from a list approved by the Supreme Court, which consists of respectable persons between the ages of forty and seventy, who are qualified lawyers, experts in a particular field, or knowledgeable laypeople.⁴⁴ Although the judge may act alone as the conciliator if he considers it appropriate and if the parties do not request a committee,⁴⁵ this happens very rarely. Usually the conciliation-in-court process is steered by a committee consisting of one judge and two commissioners, although more than two may be appointed for special reasons.⁴⁶

The goal of conciliation-in-court is to settle disputes in accordance with reason, equity, and the actual circumstances of the case, on the basis of mutual concessions.⁴⁷ To serve this purpose the committee must always be composed of two or more commissioners selected from among citizens outside the judiciary, who are equipped with the ability to lead the parties towards agreement smoothly and actively through their experience

44. Minji Chôteihō (Civil Conciliation Act), Law No. 222 of 1951, art. 5, 8.

45. *Id.* art. 5.

46. *Id.* art. 6.

47. *Id.* art. 1.

of particular fields or of social life in general.⁴⁸ If the conciliation is satisfactorily concluded, the court records the result, which has the same binding effect as that of a final court decision or a recorded settlement-in-court.⁴⁹

A. *The Statutory Basis*

Unlike settlement-in-court (*wakai*), whose statutory foundation is narrow, but has been gradually developed through many years of court-directed initiative and judicial practice, conciliation-in-court (*chōtei*) is dictated by a separate and elaborate statute, the Civil Conciliation Act of 1951, as amended in 1974 (the Act). The Civil Conciliation Rules of 1951 (the Rules) provide additional detailed procedures. The Act repealed the former fragmented statutes that had provided for conciliation in various types of civil cases, and erected a uniform system of voluntary conciliation proceedings in all civil matters except family and labor disputes.⁵⁰

With these two major exceptions, the civil conciliation-in-court system covers all civil disputes; the Act classifies the cases in the following categories:

- (1) Immovable property (real estate),
- (2) Agriculture,
- (3) Commercial,
- (4) Mining,
- (5) Traffic accidents,
- (6) Environmental pollution, and
- (7) Miscellaneous.

48. *Id.* art. 8(1).

49. MINSOHŌ (Code of Civil Procedure) art. § 203 (transl. by Bernard Rudden and Nobuaki Iwai).

50. Among those repealed in whole or in part: Land and House-Lease Conciliation Act (1922), Farm Tenancy Conciliation Act (1924), Labor Disputes Conciliation Act (1926), 12 Commercial Matters Conciliation Act (1926), Monetary Claims Temporary Conciliation Act (1932), Mining Industries Act (1939, revised 1950), and Special Wartime Civil Matters Act (1942). Family conciliation falls under the Family Matters Adjustment Act (1947, revised 1974), which replaced the Personal Matters Conciliation Act (1939). Before being brought to trial, all family disputes are initially dealt with by a family matters conciliation process before a collaborative body consisting of one judge and two commissioners experienced in family matters. Kaji Shinpanho (Family Matters Adjustment Act), Law No. 152 of 1947, §§ 3(2), 17, 18. Labor conciliation has its own mechanism run by the Labor Committee under various statutes in the field. *See infra* p. 36. *See also*, D. HENDERSON, 2 CONCILIATION AND JAPANESE LAW: TOKUGAWA AND MODERN 208-14 (1965).

B. *Procedure*

Unlike settlement-in-court, which always begins with the filing of a formal lawsuit that is then switched to the ADR mode, conciliation-in-court is an option from the beginning: a plaintiff can initially request conciliation instead of a trial. The appropriate summary (*i.e.*, lowest) or district court has jurisdiction and appoints committee members appropriate for that case.⁵¹ Even if the plaintiff elects to file suit, the judge may switch the case to conciliation-in-court without the parties' consent in the initial stage of the suit. After that stage, however, the parties must consent.⁵² Once the case has been switched to conciliation, the process continues as if it had been originally selected.

Two important points must be made on the role of the judiciary in this process. The first is that in practice the judge that chairs the committee is not expected to play a particularly active role. Initiative lies with the commissioners; they report to and may consult the judge, who does not otherwise intervene. Indeed he does not often attend meetings after the initial one, unless specifically asked to do so or when the concluded agreement is recorded.⁵³ Accordingly, the status of the judge as chair is nominal. There are two reasons for this practice. First, the judges wish to respect the initiative of the commissioners in order to achieve the goals of conciliation-in-court; secondly, judges are too busy with their heavy caseload to spend time as passive observers in committee meetings.⁵⁴

The second important point concerning the judge's role is that when a case filed in court is transferred to conciliation in the same court, the judge that heads the committee is normally not the judge that will later hear the case. Once the conciliation mode begins, and until it fails, the trial judge normally plays no further part. It is also legal for the same judge to chair the committee and try the case, but this happens very rarely.⁵⁵ Furthermore, there has traditionally been little communication between the two judges.⁵⁶

51. Minji Chōteiho (Civil Conciliation Act), Law No. 222 of 1951, arts. 3, 7.

52. *Id.* art. 20(1).

53. See RINJI CHŌTEI SEIDO SHINGIKAI, RINJI CHŌTEI SEIDO SHINGIKA I TŌSHINSHO 48-53 (1973); Kajimura, et al., *Minji Chōtei no Shomondai (Zadankai)*, 4 BESSATSU HANREI TAIMUZU 80, 126-29, 108 (1977) (the comments of experienced judges and lawyers); Kojima & Taniguchi, *Access to Justice in Japan* in ACCESS TO JUSTICE 423-24 (M. Cappelletti & B. Garth, eds. 1978); Saitō, *Minji Chōtei no Kadai*, 4 BESSATSU HANREI TAIMUZU 6, 13 (1977).

54. *Id.*

55. See Shihō Kenshūsho, *supra* note 5, at 200-01, 204.

56. *Id.*

Thus, although conciliation-in-court is an in-court process undertaken within the judicial framework, the procedure is not substantially controlled by the judge. This lack of judicial control clearly distinguishes the process from that of settlement-in-court, which is entirely handled by the trial judge. The contrast in judicial attitudes to the two methods derives from their differing roles in the two methods; it will be described later, as will the new attitudes to the recent reforms.

The entire procedure of conciliation-in-court is quite informal and left totally to the discretion of the committee.⁵⁷ The hearing is not open to the public⁵⁸ and usually the parties are heard individually, because their hostile feelings may make it difficult to clarify the facts and generate an atmosphere conducive to compromise.⁵⁹ Only in exceptional cases are both parties summoned together, although recently some judges have advocated this practice.⁶⁰

The committee is not bound by the law or weight of the evidence (in a formal sense). Their standards are reason, common sense, equity, and morality. When it works, it is very well suited to the Japanese mentality because the parties can reach an agreement consonant with their real interest and can avoid a strict application of the law, whose all-or-nothing solutions may prevent the restoration of harmonious human relationships.⁶¹

If necessary, the committee can investigate disputed facts through inquiry of concerned persons or by examining the place involved,⁶² can summon a witness for informal inquiry or formal examination,⁶³ can procure an opinion from experts who are not themselves members of the committee,⁶⁴ and can formally appoint a neutral expert to submit an opinion.⁶⁵ The committee can also hold sessions at any place directly related to the dispute.⁶⁶ The choice among these methods is left entirely

57. With regard to the possible variations on the basic proceeding, see T. KAJIMURA & R. FUKAZAWA, *supra* note 11, at 539-53.

58. Minji Chōtei Kisoku (Civil Conciliation Rules), Supreme Court Rule No. 8 of 1951, art. 10.

59. See T. KAJIMURA & R. FUKAZAWA, *supra* note 11, at 558-59; Kajimura, *Minji Chōtei no Ninisei to Handansei*, 32 MINJI SOSHŌ ZASSHI 165, 174-75 (1986); Yoshioka, *Soshō to Chōtei*, 4 BESSATSU HANREI TAIMUZU 27, 29 (1977).

60. *Id.*

61. See Kawashima, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 53-56 (A. T. von Mehren ed. 1963).

62. Minji Chōtei Kisoku (Civil Conciliation Rules), Supreme Court Rule No. 8 of 1951, art. 12, 12-2.

63. *Id.* art. 12(4); MINSOHŌ (Code of Civil Procedure) art. 271.

64. Minji Chōtei Kisoku (Civil Conciliation Rules), Supreme Court Rule No. 8 of 1951, art. 14.

65. *Id.* art. 12(4); MINSOHŌ (Code of Civil Procedure) art. 301.

66. Minji Chōtei Kisoku (Civil Conciliation Rules), Supreme Court Rule No. 8 of 1951, art. 9.

to the commissioners.⁶⁷ In practice, the formal and adversarial examination of witnesses is rarely used; obtaining the opinion of expert commissioners or examining the site is relatively more common. However, even the latter devices are used in only a very small proportion of cases. For example, in 1975, on average, independent investigation of the evidence occurred in less than 1 percent of conciliation cases.⁶⁸ This practice has been criticized as promoting the easy-going attitude of some commissioners.⁶⁹

In the large cities whose courts can draw on a sufficient number of expert commissioners (e.g., land valuers, architects, and medical practitioners), experts are normally called upon to serve in appropriate cases.⁷⁰ Even when agreement cannot be reached, the opinion of an expert on a matter within his special field of competence is often very useful to the trial judge, who receives a report from the committee. For instance, real property disputes have proved very difficult to resolve through settlement-in-court because of the need for special expertise, and consequently, conciliation-in-court with an expert commissioner is now widely utilized.

The process of conciliation and the skills required of the commissioners are almost the same as those required for settlement-in-court. After an introductory and explanatory session, the committee usually invites each side to meet with them separately to explain their complaints.⁷¹ Here again, it is important for the committee to allow the party to fully discuss her complaints, including those that are irrelevant to the legal issues, and to listen with patience and understanding.⁷² The committee must gain the trust of the parties as to their impartiality and wisdom. After sufficient time has been devoted to this stage, the committee suggests positive approaches towards compromise, usually offering several choices; at the end of each meeting the parties are advised to reflect on these and to consider the possibility of further concessions. At the final stage, the committee often submits a concrete proposal for agreement to both parties and invites them to accept it. One party may accept the other's final offer or both may accept the committee's proposal. In either case the outcome, when registered in court, has the effect of a

67. With regard to details of the procedure of investigation, see T. KAJIMURA & R. FUKAZAWA, *supra* note 11, at 499-523.

68. See 2 D. HENDERSON, *supra* note 50, at 224-25; RINJI CHÔTEI SEIDO SHINGIKA I, *supra* note 53, at 63; Saitô, *supra* note 53, at 11; Sasaki, *Minji Chôtei ni okeru Jian no Kaimei*, 4 BESSATSU HANREI TAIMUZU 52, 54-55 (1977).

69. See *supra* note 68.

70. See Shihô Kenshûsho, *supra* note 5, at 207; Kojima, *Minji Chôtei ni okeru kokumin no Sanka*, 4 BESSATSU HANREI TAIMUZU 34, 38 (1977).

71. See *supra* note 59 and accompanying text.

72. See T. KAJIMURA & R. FUKAZAWA, *supra* note 11, at 555-56.

final court judgment.⁷³ If the committee concludes that there is little hope of conciliation, they normally terminate the process. They can also, if rarely, terminate without forming their own conclusion if they find that the content of a proposed agreement would be contrary to law or public policy.⁷⁴ To this limited extent, the committee is expected to supervise the legal content of the conciliation, as an institution within the court system.⁷⁵ If the process was initiated by the parties and is terminated without success, the parties are allowed to file suit, if they wish. If the process began on remand from a trial court, then the issue is once again remitted to that court with a report from the committee.

C. *Settlement and Conciliation-in-Court Compared*

Although there are several similarities between conciliation and settlement-in-court, important differences emerge. First, because the judge who chairs the conciliation committee will not try the case and indeed rarely participates in any substantial way, the committee rarely expresses any opinion on the likely outcome of the case; indeed, the general consensus is that they should not.⁷⁶ The committee's opinion would be considered speculation and might provoke mistrust. Even if the committee expresses an opinion on legal or evidentiary matters, the opinion is mentioned as only one among many factors to be considered, and the committee will disclaim its opinion as a temporary impression based only on limited resources. In practice even this tentative view is rarely offered; the committee's methods are more subtle -- it tries to achieve reconciliation by the use of ambiguous expressions without emphasizing what is true and what is not or what is right and what is wrong, for fear that either party should lose face. In proposing its solution, the committee usually emphasizes reason or common sense, intimating that this is a perfectly adequate basis for the proposal; attention may also be drawn to the proposal's economic merits. In this way, conciliation-in-court is much more like private mediation than is settlement-in-court, in which the judiciary runs the proceedings and often hints at their opinion on the merits of the case. The procedure is not identical to private mediation, however, because the chairing judge is available to play a certain, even if passive, role as the supervisor of legal and general rationality. In any event, conciliation-in-court does not raise the same delicate issues on the proper role of a judge as does his dual

73. MINSOHŌ (Code of Civil Procedure) art. 203 (transl. by Bernard Rudden and Nobuaki Iwai).

74. MINJI CHŌTEIHŌ (Civil Conciliation Act), Law No. 222 of 1951, art. 14.

75. See T. KAJIMURA & R. FUKAZAWA, *supra* note 11, at 604-05.

76. *Id.* at 565.

roles in settlement-in-court. On the other hand, conciliation-in-court cannot fully guarantee that the outcome will reflect a proper assessment of the arguments or the evidence, because the committee cannot usually collect sufficient evidence or weigh arguments at this early stage in the case, and because the committee may emphasize more than the legal issues of the case.

Secondly, the judge who chairs conciliation-in-court has no power in that mode to deliver a final unilateral decision. By contrast, the Act empowers the trial court that remands a case to conciliation to issue a ruling in lieu of conciliation, which has the same legal effect as a recorded settlement-in-court, unless one of the parties or interested persons objects within a limited period.⁷⁷ This type of ruling may raise constitutional issues⁷⁸ and deserves some attention. Article 17 provides:

Where there is no possibility of conciliation being formulated by the Conciliation Committee, the Court, if it thinks fit, may on its own authority render such ruling as may be necessary for the settlement of the case in so far as this is not contrary to the tenor of the applications of both parties. In doing so, the Court shall seek the opinion of the conciliation commissioners composing the Conciliation Committee, shall consider the matter equitably from both sides, and take all circumstances into account. The ruling may order the payment of money, the delivery of things, or any other performance relating to property.⁷⁹

If, however, an objection is filed within two weeks, the ruling is void; otherwise it has the same binding effect as a recorded settlement-in-court.⁸⁰

This technique was adopted piecemeal by pre-war and wartime legislation and carried over into the uniform procedure created under the 1951 Act, which made one important change. Under the earlier legislation a ruling in lieu of conciliation could be challenged only on formal appeal; if the appeal was unsuccessful, the ruling took effect as a final, enforceable decision, regardless of the will of the parties. In 1960, the Supreme Court held that a number of these provisions violated the constitutional right of access to the courts⁸¹ and requirements of public

77. MINJI CHÔTEIHÔ (Civil Conciliation Act), Law No. 222 of 1951, arts. 17, 18.

78. With regard to the issue of constitutionality, see D. HENDERSON, *supra* note 50, at 229-34.

79. MINJI CHÔTEIHÔ (Civil Conciliation Act), Law No. 222 of 1951, art. 17 (transl. by Bernard Rudden and Nobuaki Iwai).

80. *Id.* art 18.

81. KENPÔ (Constitution) art. 32 (Japan).

trial.⁸² The present statute gives the parties or interested persons the power to annul the court's ruling by simply lodging an objection; thus, the court's powers are constrained by the free will of the parties. It is assumed, that this has solved the constitutional problem.⁸³ But it is noteworthy that this procedure is not available in settlement-in-court.

A ruling in lieu of conciliation arises only when the committee's solution has failed; requiring the parties to seriously reconsider the proposal, in light of the knowledge that the trial court also regards it as an equitable solution. The rule may be beneficial when the conciliation committee's efforts fail because of one party's obstinacy over trivial or irrational matters, or because of some very slight difference in the parties' opinions.⁸⁴ Because the parties can file an objection, the court's ruling is like an officially and judicially announced solution that is presumptively the end of the matter, unless challenged. Therefore, the process differs from the court's original role of adjudication and even from binding arbitration, and still respects the basic structure of the conciliation process.

Published statistics show an increase in court rulings in lieu of conciliation.⁸⁵ Although not commonplace, the very possibility of their use enhances the initiative of the committee throughout the conciliation process in a way that distinguishes the process from both settlement-in-court and private mediation. However, because the committees usually avoid discussion of formal legal issues, and the parties can nullify the ruling by filing an objection, the judge does not have the power to influence the legal issues that he has in the settlement-in-court process. Thus, the outcome may not correlate with the conciliation committee's or the judge's views on the law or the evidence.

The two features of conciliation-in-court just described, which distinguish it from settlement-in-court, are closely related to some serious criticisms of the former system.

82. KENPŌ (Constitution) art. 82 (Japan). See Judgment of July 6, 1960, Saikō Saibansho (Supreme Court), Japan, 14-9 Minshū 1657. For an English account, see D. HENDERSON & J. HALEY, *LAW AND THE LEGAL PROCESS IN JAPAN* 683-701 (1978); 2 D. HENDERSON, *supra* note 50, at 231-34.

83. See T. KAJIMURA & R. FUKAZAWA, *supra* note 11, at 613-14.

84. See MINJI CHŌTEI HŌKI CHIKUŌ KAISETSU 80 (Saikō Saibansho Jimusōkyoku ed. 1970).

85. T. KAJIMURA & R. FUKAZAWA, *supra* note 11, at 615 (citing 39-12 HŌSŌ JIHŌ 102 (1987)).

D. *Criticisms and Reassessment of Conciliation-in-Court*

Since the Act of 1951, the practice of conciliation-in-court has been subject to severe criticism by Japanese scholars and practitioners,⁸⁶ and even by the occasional Western expert.⁸⁷ The main thrust of the criticism is as follows. Conciliation commissioners tend to disregard substantive law and try to impose traditional community values, even at the sacrifice of modern legal concepts that are guaranteed as individual rights. Further, they do this in an almost coercive or authoritative way by subjecting parties to social pressure, forcing them to follow a collective consensus of community morals. Often the commissioners do not care about the content of a resolution, but immediately try to wring mutual concessions from the parties without making factual and other inquiries sufficient to enable them to arrive at an informed opinion. Sometimes it is critically described as "O.K., O.K." (*mā mā*), or "fifty/fifty" (*seppan*) conciliation. These names stem from the fact that commissioners are usually laypeople that have retired from respected positions. As a result, they lack any proper qualifications or training as mediators.

Although it is impossible to generalize, there has been considerable variety in the quality of lay commissioners, with the exception of expert commissioners or lawyers, and the lack of qualifications or training has been particularly prevalent in rural areas. Complaints have been made not only by lawyers, but also by the parties.⁸⁸

The judiciary has also responded negatively to conciliation-in-court and prefers settlement-in-court, in which judges manage the whole process themselves. When cases come back after fruitless months in the conciliation committee, judges naturally regret the delay. Distrust of the process is also still prevalent among the judiciary,⁸⁹ despite the recent improvements initiated by the Supreme Court regarding the selection and

86. See Endō, *Ureubeki Wakai Chōtei no Seikyō*, 33 HÖRITSU JIHŌ 496-501 (1961); Kawashima, *Shakai Kōzō to Saiban*, 432 SHISŌ 1-17 (1960); Kawashima, Nagano, Hasebe, Niimura, & Iijima, *Chōtei Seido no Jitsujō to Kekkai*, 28 HÖRITSU JIHŌ 177-95, 347-65 (1956); Koyama, *Chōtei Hō-Chūsai Hō*, 38 HÖRITSUGAKU ZENSŪ 8-10 (1958); Saito, *supra* note 45; Sasaki, *Chihō ni Okeru Minji Chōtei: Shimaneken ni Okeru Jittai Chōsa ni Motozuite*, 32 HÖRITSU JIHŌ 1051-57 (1960); Sasaki, *Minji Chōtei ni Okeru Hōteki Handan to Jian no Kaimei: Shimaneken ni Okeru Jittai Chosa o Kiso to Shite*, 7 MINJI SOSHŌ ZASSHI 143-76 (1961); Sasaki, *Minji Chōtei*, in 6 HŌSHAKAIGAKU KŌZA (2 FUNSŌ KAIKETSU TO HŌ) 150-69 (T. Kawashima ed. 1972); Sasaki, *Minji Chōtei ni okeru 'Gō' no Kentō*, 9 (no. 1 & 2) KANAZAWA HŌGAKU 1, 23-31 (1963).

87. See 2 D. HENDERSON, *supra* note 50, at 223-29; Haley, *The Politics of Informal Justice: The Japanese Experience 1922-1942*, in 2 THE POLITICS OF INFORMAL JUSTICE: COMPARATIVE STUDIES 138-40 (R. Abel ed. 1982); Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 372-76 (1978).

88. See D. HENDERSON, *supra* note 50, at 226; Saitō, *supra* note 53, at 15; Sasaki, *supra* note 86, at 1051-57.

89. See Shihō Kenshūsho, *supra* note 5, at 197-203; *Wakai to Soshō Unei*, *supra* note 32, at 144 (the comments of experienced judges).

training of commissioners. Therefore, conciliation-in-court usually commends itself to a judge only when the particular case requires special expertise that may be supplied by particular commissioners. Consequently, most cases decided by conciliation-in-court have been submitted to the process by the parties.

The 1988 figures for Japan indicate that the number of cases transferred to conciliation-in-court by trial judges is only 2,489 out of 119,566 lawsuits at the district court level (2.08 percent), of which 1,742 cases were successfully resolved by the process.⁹⁰ The summary court figures indicate that 2,665 out of 157,200 were transferred (1.69 percent).⁹¹ The number of cases submitted to conciliation by the parties at the outset was 54,814, compared with the 1,392,053 cases filed in the summary courts.⁹²

The figures suggest that -- whatever the judges may feel -- the procedure may often look better to lay people than formal litigation. It is less expensive, may be faster, and the parties need not fear the strict application of the law or the shame of being a party to a lawsuit (a very real sentiment to many). To this extent, conciliation-in-court is a popular form of ADR because a party can select it from the beginning and utilize the court's resources to help him settle his dispute for a low cost. Avoidance of litigation is not seen as backward or oppressive; on the contrary it may, in appropriate cases, be more efficient and equitable in terms of both the Japanese cultural background and even Western concepts of rationality.⁹³ We should not overlook the successful examples where conciliation-in-court enables people to obtain easy access to the judiciary, often without the aid of attorneys, and attain at low cost a speedy restoration of harmony through a mediated compromise that suits the Japanese character. The system's problems must be taken seriously and improvements are called for; but it would be wrong to underestimate its value by overlooking the many cases in which experienced conciliators, on the basis of reasonable consideration of legal concepts, are able to use their wisdom, experience, and expertise as an aid to harmonious resolution.

Additionally, the conciliation-in-court process takes away nothing: it merely adds another device, another option, to the system of ADR in Japan. At the least, it can play a role in the pre-litigation context. It gives the Japanese a system that involves the court (which they respect),

90. 1988 SHIHÖ TÖKEI NENPÖ *supra* note 10, at 133.

91. *Id.* at 109.

92. *Id.* at 3.

93. See Kitagawa, *Resonance Theory -- A Tentative Approach in the Dispute Settlement Mechanism*, in RECHTSVERGLEICHUNG, EUROPARECHT UND STAATENINTEGRATION 393, (G. Luke, G. Ress & M. Will eds. 1983).

but not litigation (which they despise). The result of these attitudes is the prevalence of conciliation-in-court before a formal trial and the use of settlement-in-court after the formal process begins. Therefore, the most important improvement to the practice of conciliation-in-court is the careful selection and comprehensive training of the commissioners. Many active proposals have recently been made for the improvement of conciliation-in-court by both practitioners and scholars on the basis of a positive reassessment of the significance of the practice to the system.⁹⁴

E. *Reforms*

Since the 1974 amendments to the Act, which required the recruitment of more appropriate conciliation commissioners,⁹⁵ the Supreme Court has been engaged in setting up a systematic and comprehensive training scheme at both the local and national levels, and has had some success in enhancing the quality of the conciliation process. At the same time, the Supreme Court has been making great efforts to secure the presence of adequate numbers of expert commissioners in various fields, often on the recommendation of the local court.⁹⁶ In turn, this results in the method being more attractive to the parties to a dispute and to judges in charge of formal trials. Similar efforts have been made at many local levels.

An example is the Chōtei Division of the Tokyo District Court,⁹⁷ which has been very successful in disposing of growing numbers of cases, partly because it nominated more expert commissioners (especially in property valuation) and partly because it encouraged judges in other divisions to transfer more cases to conciliation-in-court by explaining its advantages at the judge's monthly conferences. However, the main reason for the success has been that the Chōtei Division has standardized and streamlined many areas of the procedure.⁹⁸ When referring a case to conciliation, the judges summarize the main facts and issues, and may make requests or suggestions to the committee. Sometimes the judge sets

94. See RINJI CHŌTEI SEIDO SHINGIKAI, *supra* note 53, at 48-53 SAIKŌ SAIBANSHO JIMUSŌKYOKU, *supra* note 36, at 9-10; Shihō Kenshūsho, *supra* note 5, at 195-211; Kojima & Taniguchi, *supra* note 53, at 724-26; Saitō, *supra* note 53, at 13; Sasaki, *supra* note 86, at 167-69.

95. With regard to the details of the 1974 amendments, see Saitō, *supra* note 53, at 7-9. For the legislature's reasons for amending the Act, see RINJI CHŌTEI SEIDO SHINGIKAI, *supra* note 53 (the committee report relied on by the legislature as the basis for its changes).

96. See Shihō Kenshūsho, *supra* note 5, at 207; Kojima, *supra* note 70, at 38.

97. This sort of special Chōtei Division exists only in Tokyo District Court and Tokyo Summary Court. The necessity of creating a special division for other local courts has recently been advocated, see Shihō Kenshūsho, *supra* note 5, at 209-10.

98. See SAIKŌ SAIBANSHO JIMUSŌKYOKU, *supra* note 36, at 9-10; Shihō Kenshūsho, *supra* note 5, at 201-02.

a deadline for a return of the case if the dispute cannot be settled; this request is not legally binding, but is observed voluntarily. In this manner, the judges have been trying to keep control of and give guidance to the conciliation process. Further, in this Division, the judge that chairs the committee is expected to play an active role in the committee's deliberations. This practice would be rather difficult in other courts that have no special chōtei division; but their adoption of the streamlined and collaborative procedures evolved in Tokyo would greatly enhance the efficiency of the system by increasing the communication between the trial judge and the conciliation committee. Bilateral communication and case administration would also be facilitated by requiring the committee to deliver regular progress reports to the trial judge. Active involvement by the judge chairman should be encouraged as much as possible, the process supervised by more frequent reports from the commissioners, and the judge chairman and the commissioners should confer on a regular basis.

Because of the recent outrageous increase in property prices in urban areas, real estate cases have become very difficult to settle through settlement-in-court, which is steered by judges with no special expertise in the field. Estimation by experts has become a virtual necessity and consequently, more and more of these cases have been transferred by the trial judge to conciliation-in-court, in which expert commissioners are available at low cost.⁹⁹ For the same reason, conciliation is increasingly selected by the parties. The use of expert commissioners in various fields can also increase. This, coupled with the improved procedure, will commend the system to more judges. For some time to come, however, the most common method of in-court ADR will be judicial transfer of the case to the settlement-in-court process discussed in the preceding section.

IV. OTHER PRINCIPAL TYPES OF ALTERNATIVE DISPUTE RESOLUTION

Outside the court system, there are other institutionalized types of ADR in Japan. They are mentioned here in order to give a balanced picture, but because of space constraints, are accorded only brief treatment.¹⁰⁰

A. *Environmental Pollution Disputes*

The Environmental Pollution Disputes Settlement Act of 1970 set up central and local dispute adjustment committees to deal with mediation,

99. See SAIKŌ SAIBANSHO JIMUSŌKYOKU, *supra* note 36, at 9-10; Shihō Kenshūsho, *supra* note 5, at 200.

100. See Fujita, *Soshōjō no Wakai to Saibangai Funsō Shori Tetsuzuki*, in Gotō & Fujita, *supra* note 9, at 40-52; Kojima & Taniguchi, *supra* note 53, at 727-33.

conciliation, arbitration, and on some issues, adjudication by the Central Committee. The boards are formed for a particular case or set of cases, and their members are selected from scientists and the medical profession, as well as lawyers, jurists, and government officials. The Act combines the virtues of low cost (for otherwise extremely expensive fact-finding measures) and powerful statutory methods of factual investigation. Another merit is its speed; despite the complexity of the issues, the average time for settlement is ten months. In practice the most common role of the committee is that of conciliation.¹⁰¹

The system is linked with the courts in that judges may, on their own motion, refer the question of causality to the Central Committee.¹⁰² The Act also set up environmental pollution counsellors as a complaints bureau provided by local government.

B. *Construction Disputes*

The 1956 amendments to the Building Industry Act of 1949 set up a Construction Disputes Committee at central and local levels as a public organization for handling building disputes.¹⁰³ Once again the Committee has powers of mediation, conciliation, and arbitration, and draws on the special knowledge of their members, who are selected for their expertise in the industry, the law, or architecture. The cost to the users is low and these bodies are used by both contractors and customers. Construction disputes are the one area in Japan where arbitration seems fairly frequent, and an arbitration clause is found in the modern model building contract forms.

C. *Labor Disputes -- the Labor Committee*

The Trade Union Act of 1949 set up central and local Labor Committees as public organs to deal with mediation, conciliation, arbitration and (for certain remedies against unfair acts of employers) adjudication in labor disputes.¹⁰⁴ Nowadays these committees are often used; like the English industrial tribunals, they are swift and cheap. Because of the existence of these committees, labor disputes arising from collective industrial relations are explicitly excluded from the scope of civil conciliation-in-court (*chôtei*). Individual disputes, however, are

101. See Kojima & Taniguchi, *supra* note 53, at 730.

102. Kōgai Funsō Shorihō (Environmental Disputes Act), Law No. 108 of 1970, § 42-32.

103. Kensetsu Gyō Hō (Building Industry Act), Law No. 100 of 1949, as amended in 1956).

104. Rōdō Kumiai Hō (Trade Union Act), Law No. 174 of 1949.

treated as general civil law matters and are within the scope of conciliation-in-court.

D. *Traffic Accident Disputes (TAD)*

1. *TAD Settlement Center.* This private institute was established as a juridical person in 1979. Its members are expert commissioners and the center deals with mediation, conciliation, and the estimation of damages, which is expressed as an expert assessment. This estimate of damages plays the function similar to that of an unofficial Ombudsmen's decision (e.g., the Insurance Ombudsman in England) in that, if accepted by the policyholder, it binds insurers because of their prior consent.

2. *TAD Counselling Center of the Japanese Bar Association.* The Japanese Bar Association has recently instituted a service in which members of the bar offer low-cost services as mediators or advisers.

3. *Local Government Mediation.* Some local authorities (such as Tokyo) provide traffic victims with mediation services on a totally voluntary basis and without any charge. The process is like a specialized citizens' advice system offered by the local government.

4. *Local Police Station Counselling.* District police stations have a special counselling section that gives initial advice to citizens involved in road accidents and often operates as a device for settling their civil disputes. The mechanism of psychological pressure on a negligent party, and the possibility of criminal investigation and prosecution, often compel the offer of reasonable compensation. In fact, in Japanese society, the police and prosecution services are often involved in the settlement of civil disputes arising from petty crime.

E. *Consumer Disputes*

The National Consumer Center is a public organization that provides information and counselling to individual consumers, which often results in settlement. The Center is supported by public money, and local consumer counsellors are trained by the Center to provide similar services within local government. As a sign of the growing consumer protection movement, the number of cases handled by the Center is increasing rapidly.

F. *Mining Industry Disputes*

The Local Mining Industry Councils are empowered to give adjudicatory rulings on compensation for damage caused by mining.

G. *Administrative Disputes*

There are a variety of public organizations to handle counselling, mediation, conciliation, and instruction for citizens complaining about the administrative acts of public authorities. Examples include the General Affairs Agency (formerly the Administrative Management Agency), its administrative counsellors at the local level, the Citizens' Counselling Room in local government, the Human Rights Protection Bureau at the Ministry of Justice, and its counsellors at the local level.¹⁰⁵ In 1975, the last year for which statistics are readily available, 28.5 percent of the 140,140 complaints received by the Administrative Management Agency, resulted in a redress of grievance, and 46.6 percent amounted to an expression of opinion or request for information by the citizen.¹⁰⁶

H. *International Disputes*

Despite the general unpopularity of arbitration in Japanese society, the Japanese Arbitration Association (JAA) and the Japanese Shipping Exchange (JSE) have been commonly used for resolving international disputes by arbitration.¹⁰⁷

I. *Small Claims*

The Arbitration Center founded in March 1990 by the Second (Daini) Tokyo Bar Association may increase the use of arbitration for ordinary civil disputes. Aimed principally at small claims cases, the Center is modelled on the institutionalized arbitration systems in England.¹⁰⁸

105. 2 GYŌSEI HŌ: GYŌSEI TETSUZUKI, GYŌSEI SŌSHŌ 86-91 (H. Minami, N. Harada & K. Tamura eds., rev. ed. 1986); 2 GYŌSEI HŌ: GYŌSEI TETSUZUKI, GYŌSEI SŌSHŌ 85-90 (H. Minami, N. Harada & K. Tamura eds. 1976).

106. GYŌSEI KANRI CHŌ GYŌSEI KANSATSU KYOKU, 1975 GYŌSEI KANSATSU NENPŌ 27 (1976).

107. See Blankenburg & Taniguchi, *Informal Alternatives to and within Formal Procedures*, in JUSTICE AND EFFICIENCY — GENERAL REPORTS AND DISCUSSION 350 (W. Wedekind ed. 1988) (report of the Eighth World Congress on Procedural Law).

108. See Harago, 'Sōdan' Kara 'Chūsai' eno Dōtei, 80 HŌ NO SHIHAI 104 (1990); Ōkawa, Tokyo Bengoshikai no "Chūkai Sentā" Setsuritsu no Gaiyō, 450 NBL 30 (1990).

V. CONCLUSION

As illustrated in the preceding sections, there are numerous types of ADR in Japan. What is characteristic of all of them is that the vast majority are public organizations or methods, established by statute or by the initiative of the administrative bodies. Apart from the JAA or the JSE, which commonly arbitrate international disputes, there are very few private institutions involved in ADR (although Bar Associations have recently set up traffic counselling centers, and an Arbitration Center has been founded). The public sector (including settlement-in-court and conciliation) is the overwhelming force in ADR, to the extent that even the police and the prosecuting services find themselves with wide powers of settling civil disputes. Alongside these ADR mechanisms exist the tradition of private, persistent negotiation and the informal use of persons of standing to act as mediators. The Japanese system affords an interesting contrast to the rising professionalism and commercialization of ADR as a private sector in the West, and the Western shift from public dispute resolution, which is regulated by the courts, to a number of totally private sectors.¹⁰⁹

Until recently, Western and even Japanese scholars have been critical of the value of these traditional modes of dispute resolution and the cultural tendency to favor compromise. These traditions have often been criticized as backwards, and an obstacle to the modernization of Japan, which in this field, would occur only when these methods were replaced by Westernized formal adjudication. The informal modes of traditional ADR favored by the Japanese people had been regarded as oppressive devices for imposing outdated community values or moralities, at the cost of sacrificing individual rights and freedom of contract. The conciliation-in-court system has been criticized as an institutionalized censure of formal adjudication, introduced in order to maintain a hierarchical social structure and a traditional moral consensus. Even settlement-in-court was initially regarded by some of the judges as less desirable than formal adjudication to a final judicial decision.

In recent years, however, and in parallel with the ADR movement in the West, there has been a reassessment of traditional -- and characteristically Japanese -- modes of ADR by both jurists and practitioners. For instance, Professor Z. Kitagawa has launched his innovative concept of resonance theory¹¹⁰ in which he harmoniously analyzes the mechanism of the cooperative interrelationship between

109. See generally, S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* (1985).

110. Kitagawa, *supra* note 93.

formal and informal means of dispute resolution. He critically re-examines the modernist view, which characterizes traditional modes as both unreasonable and as totally incompatible with modern methods. In contrast with the modernists' polarization of tradition and modernity, Kitagawa points to the efficiency and efficacy of the former ways of handling certain problems. He proposes that there is a cooperative interrelationship between formal and informal means of dispute resolution, which he calls resonance and which varies from high to low depending on the nature of the process or of the dispute.¹¹¹

In this context, the system of conciliation-in-court or settlement-in-court should be the best example of resonance. Despite several problems in the former practice of conciliation-in-court, recent efforts made by the Japanese courts have improved the practice and led to a re-evaluation of its utility, even by academics. Further, as a result of the acceleration in the complexity, diversity, and multiplicity of disputes and the increase in the number of cases filed in court, the judiciary has come to consider settlement-in-court as an important process with the same positive significance as the adjudicatory decision; consequently, the judges use the process more frequently. This relatively new development has been supported by both the legal profession and legal and other scholars.

Nowadays, whether in the West or the East, the functions that informal methods of dispute resolution can perform in various situations of social conflict are extremely significant in that ADR is often better at the task -- even from a Western point of view -- than is a given system's formal process. It would be wrong (as happened in Japan in the past) to underestimate ADR's value simply because the methods are traditional. Furthermore, the collaborative cooperation of these informal measures within the formal structure could improve the process of dispute resolution and fill the gaps in formal dispute resolution. In this context, it would be interesting to examine how the Japanese judiciary has been deepening the mutual resonance between the systems through the procedures of settlement-in-court and conciliation-in-court. Both could be described as mixed forms of formal adjudication and ADR.

As a result of recent developments, alternative dispute resolution seems to be a common asset of both societies. In the United States, where ADR processes (outside commercial arbitration) had been thought to be of little importance to lawyers and jurists, they now, as part of the rise of the ADR movement, approach a status and popularity almost equal

111. This concept of cooperative interrelationships between formal and informal means of dispute resolution would be harmoniously coordinated with the character of Japanese law in which "official law" (state law) and "unofficial law" (folk law) interact with each other very vividly and flexibly; see Chiba, *The Channel of Official Law to Unofficial Law in Japan*, in *PEOPLE'S LAW AND STATE LAW: THE BELLAGIO PAPERS* 207 (A. Allott & G. Woodman eds. 1985).

to adjudication. In Japan, where traditional ADR had been criticized as backward and irrational by the modernists, its adequacy and efficiency are now being reassessed in parallel with the ADR movement of the West. ADR now attracts the keen interest of lawyers and jurists all over the world, as is demonstrated by the fact that it was chosen as the theme of the World Conference on Procedural Law in 1987.¹¹²

At the same time as this development, the gap between both countries seems to be diminishing in various ways. First, as mentioned in the introduction, the trial judges in the United States have become more actively involved in settlement conferences (which are similar to settlement-in-court).¹¹³ Since 1970, several states have adopted mediation programs for civil cases (which are similar to conciliation-in-court) in an attempt to cure the delays in formal litigation. The introduction of in-court settlement or conciliation of civil matters is now quite common, and is also found in continental European countries (*e.g.*, Germany and France)¹¹⁴ and the Commonwealth countries of Australia, New Zealand and Canada.¹¹⁵ It may be that, even in Western societies, the social environment for the modern world will no longer allow the judiciary to remain closely confined within traditional adjudication procedures.

Furthermore, a number of Western ADR methods, such as private arbitration institutes, are now being tried in Japan. The recent ADR movement in the West has aroused the interest of and has influenced Japanese lawyers and academics, because it has strongly confirmed their reassessment of traditional approaches and of the methods of in-court settlement and conciliation. The resonance of traditional and modern approaches proposed by a Japanese scholar¹¹⁶ as the ideal goal of dispute resolution will hopefully lead to a harmonious confluence of Western and Eastern views; in other words, an international accord in the field of dispute resolution.

Considering these very recent movements on both sides of the globe and in the increasingly international academic world, the differences between the countries may diminish. Furthermore, if both sides persist in

112. See Blankenburg & Taniguchi, *foreword to THE EIGHTH WORLD CONFERENCE ON PROCEDURAL LAW: JUSTICE AND EFFICIENCY – GENERAL REPORTS AND DISCUSSIONS* at v (W. Wedekind ed. 1989).

113. See J. RYAN, A. ASHMAN, B. SALES & S. SHANE-DUBOW, *supra* note 1 at 173-95; Kojima, *Beikoku ni Okeru Utae Teikigo no Waikai*, in Gotō & Fujita, *supra* note 9, at 53-100; Tanaka, *supra* note 9, at 142-46.

114. See 2 D. HENDERSON, *supra* note 50, at 252-53.

115. LONDON COMMON LAW AND COMMERCIAL BAR ASSOCIATION, *ALTERNATIVE DISPUTE RESOLUTION: PROPOSAL FOR A PILOT SCHEME SUBMITTED TO THE GENERAL COUNCIL OF THE BAR ON BEHALF OF THE LONDON COMMON LAW AND COMMERCIAL BAR ASSOCIATION* 3 (1990) (Secretary, Andrew Smith, QC; Fountain Court; Temple EC4Y 9DH).

116. Kitagawa, *supra* note 93.

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sincere efforts to enhance mutual understanding and appreciation of each other's methods, the real world may be closer to the ideal of international accord in dispute resolution. Convergence should be encouraged. The lessons to be drawn from comparative studies of ADR should be appreciated and absorbed in the context of each country. In some quarters, there is still a view that -- if only its accidental defects of cost and delay could be removed -- adjudication is superior, and ADR should be adopted only as necessary to deal with these defects. Perhaps that view is wrong. To realize the most equitable balance of efficiency and substantial justice, perhaps the ideal form of dispute resolution is neither the formal nor the alternative, but some future combination of the two.

